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In the Supreme Court of the United States

October Term, 1969

CASE No. 477

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

vs.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.,
Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Where a Federal District Court has been the forum for seven years of litigation involving a uniquely complex dispute under the Railway Labor Act, and has assumed jurisdiction in and has pending before it, cases:

a) administering the self-help exceptions to collective bargaining agreements "reasonably necessary" to the carrier party to the dispute;

b) ordering the carrier party to bargain in good faith with its labor organizations;

c) purportedly "mandating" the connecting carriers to perform interchange with the struck carrier;

d) determining the effect of this purported "mandate" as applied to striking employees and employees of the connecting carriers; and,

e) finding the self-help picketing activities of the respondents to be lawful and protected under controlling Federal law;

may the Federal District Court "in aid of its jurisdiction" and "to protect or effectuate its judgments", under 28 U.S.C. §2283, enjoin the enforcement of a state court injunction proscribing respondents' identical self-help picketing activities based solely upon inapplicable state law, which the District Court has concluded would infringe upon its jurisdiction and nullify its prior orders and delineation of rights of the parties?

2. Were the self-help picketing activities of respondents within the scope of "conduct protected from state proscription", as determined in this Court's decision in *Brotherhood of R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 393 (1969)? And if determined to be so, should that decision be summarily overruled?

3. Under the circumstances presented in Question 1, does the Norris-LaGuardia Act operate to prohibit the District Court from enjoining state proceedings "in aid of its jurisdiction" and "to protect or effectuate its judgments"?

STATEMENT

This case presents yet another episode in that most extraordinary chapter of American labor-management relations — the Florida East Coast Railway strikes. As the dispute formally enters its *eighth* year for the FEC's Nonoperating employees, its *fifth* year for trainmen, conductors and hostlers, and its *fourth* year for engineers, whose union the Brotherhood of Locomotive Engineers (BLE) is the sole union respondent in the present case, it is important to recognize that the present case, although bearing a separate court file number and concerned with one aspect of the legal situation with regard to the FEC is merely one of a number of suits involving the FEC disputes currently pending in the District Court for the Middle District of Florida, Jacksonville Division.[1] These cases have occupied and continue to occupy that Court's attention, the attention of the Court of Appeals for the Fifth Circuit, and this Court, as they have for years. This case

[1] *E.g., Florida East Coast R. Co. v. Jacksonville Terminal Co.*, et al., U.S.D.C. M.D. Fla., No. 63-16-Civ-J, Preliminary Injunction entered January 30, 1963; *United States v. Florida E. C. Ry. Co.*, Case No. 64-107-Civ-J, U.S.D.C. M.D. Fla. Preliminary Injunction entered October 30, 1964, *aff'd*, 348 F.2d 682 (5th Cir. 1965); *aff'd sub nom. Brhd. of Ry. & S. S. Clerks v. Florida E. C. Ry Co.*, 384 U.S. 238 (1966); *Mungin v. Florida E. C. Ry. Co.*, Case No. 67-764-Civ-J, U.S.D.C. M.D. Fla., Order, April 15, 1968, *reversed*, 416 F.2d 1169 (5th Cir. 1969), Orders entered by Mr. Justice Brennan extending time to file Petition for Certiorari, December 29, 1969 and January 19, 1970; *Brotherhood of Locomotive Engineers, et al., v. Atlantic C. L. R. Co., et al.* Case No. 65-352-Civ-J., U.S.D.C. M.D. Fla.

did not arise in a vacuum but in the context of the total legal situation which has been created by the decisions of this Court in *Brotherhood of Ry. and S.S. Clerks v. Florida E. C. Ry. Co.*, 384 U.S. 238 (1966) and *Atlantic C.L.R. Co. v. Brhd. of Railroad Trainmen*, 385 U.S. 20 (1966) *affirming*, 362 F.2d 649 (5th Cir. 1966) together with this Court's decision late in the last term *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969), and of course, the additional decisions of the Court of Appeals and District Court.

Background — The initial decision of this Court in *Brhd. of Ry. and S.S. Clerks v. Florida E.C. Ry. Co.*, 384 U.S. 238 (1966) relates the early history of the FEC dispute which began as a strike by the FEC's non-operating employees in January, 1963. Since the mandate of this Court came down in the *Clerks* decision in May of 1966, that case has remained pending in the District Court for the Middle District of Florida, upon the issues of the self-help exceptions to collective bargaining agreements "reasonably necessary" to continue FEC's operations, of FEC's repeated contumacy[2], of the relief necessary to restore and recreate the status quo required by the Railway Labor Act, *Detroit & T.S.L. R.R. Co. v. United Transp. U.*, ____ U.S. ____, 90 S.Ct. 294 (1969), and of the issuance of a permanent injunction against future violations of the Railway Labor Act by FEC. Hearings were held in this case as recently as January 13, 1970, and a "Final Hearing" has been set to commence on April 6, 1970, to continue throughout April and May if necessary. The District Court's in-

[2]The most recent finding of FEC contempt was by Order dated September 23, 1968. Additional Orders to Show Cause were issued by the District Court on October 8, 1968, and March 14, 1968, relating to FEC bad-faith bargaining and massive subcontracting of work in violation of the Court's injunction.

junction which was affirmed by this Court in its *Clerks* decision, specifically included a mandatory requirement that the FEC "bargain in good faith with the labor organizations representing the crafts or classes of FEC employees". (Supreme Court Record, Vol. I, p. 191, *Brotherhood of Ry. and S.S. Clerks v. Florida E.C. Ry. Co.*, supra; this injunction is also reproduced in the Court of Appeals for the Fifth Circuit's latest opinion dealing with the FEC disputes, *Mungin et al. v. Florida E.C. Ry. Co.*, 416 F.2d 1169, 1172-73 fn. 16 (5th Cir. 1969).) We point this out to bring to the Court's attention the fact that the two Federal District Judges in the Middle District of Florida, Jacksonville Division, Judges Charles R. Scott and William A. McRae, Jr., have undertaken to and virtually monthly administer what have been described by Chief Judge Brown of the Court of Appeals for the Fifth Circuit as their "railroad duties", *Mungin v. FEC*, 416 F.2d at 1174, in connection with the supervision of self-help engendered by the FEC disputes.

Since the earliest days of the dispute, when FEC resumed its operations[3] using striker replacement crews, the employees have sought to bring their economic power to bear on the actual location where FEC receives and delivers freight with its connecting carriers, the points of interchange.

These efforts of the striking unions to picket the points of interchange, where FEC trains daily operate to receive and deliver the freight traffic which enables it to operate unimpeded in the face of continuing lawful strikes, have

[3]Such operations were, of course, in violation of the Railway Labor Act until the FEC was enjoined prospectively almost two years later.

each spawned prolific litigation. The FEC operates primarily in a stright north-south line along the east coast of the State of Florida. At the FEC's southern terminus where it interchanges freight with the Broward County Port Authority,[4] and at its northern terminus in Jacksonville where FEC interchanged freight on the premises of the Jacksonville Terminal Company with the Seaboard Air Line Railroad (SAL), and Southern Railway, and on the premises of the Moncrief Yard where FEC interchange was performed with the Petitioner, Atlantic Coast Line Railroad Co. (ACL), picketing at each interchange point has involved its own lengthy injunctive proceeding.

In each instance, with the exception of the Federal District Court in the present case, the trial courts both federal and state, issued injunctions which were only reversed after years of appeals through the state and federal appellate courts. Picketing of the interchange carried out on the premises of the Jacksonville Terminal Company was, of course, three times before this Court.[5]

The decision of this Court late in the last term *Brotherhood of R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969), in which certiorari was granted "to determine the extent of state power to regulate the economic combat of parties subject to the Railway Labor Act," 394 U.S. at 372, should, we submit, have written an end to the Florida state courts granting of injunctions based

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[4]*See, Brotherhood of Locomotive Firemen & Enginemen v. Florida East Coast R. Co.*, 346 F.2d 673 (CA 5 1965).

[5]*Atlantic C. L. R. Co. v. Brhd. of Railroad Trainmen*, 385 U.S. 20, (1966) *affing* 362 F.2d 649 (CA 5 1966); *Brhd. of Railroad Trainmen v. Jacksonville Terminal Co., certiorari denied*, 385 U.S. 935 (1966); *Brhd. of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969).

upon Florida state law against picketing by parties whose disputes have run the gamut of the Railway Labor Act's procedures. By reason of the recalcitrance of the Florida state courts, however, this was not to be.

In this case the Federal District Court having assumed jurisdiction and having entered Orders concerning the FEC disputes in a myriad of cases, specifically requiring good faith bargaining on the part of FEC, having entered an order purportedly requiring the ACL and other connecting carriers to perform interchange, having assumed jurisdiction in a case filed by the unions to construe this order,[6] and having entered an order in the present case specifically finding that the picketing carried on by the respondent union at ACL's Moncrief Yard is lawful and protected under Federal law, has found it necessary

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[6]Interestingly, the petitioner asserts that ACL-FEC interchange is "mandated by an existing Federal Court injunction", (Pet. Br. p. 46) citing *Florida East Coast R. Co. v. Jacksonville Terminal Co., et al.*, U.S.D.C., M.D., Fla., No. 63-16-Civ-J, Order of January 30, 1963. This injunctive order obtained by the FEC within the first week of the strike is a topic of discussion in the opinion of the Fifth Circuit Court of Appeals in *Brhd. of R. Trainmen v. Atlantic Coast Line R. Co.*, 362 F.2d 649, 651 (5th Cir. 1966), *aff'd*, 385 U.S. 20 (1966). As the Court of Appeals points out the aggrieved unions were not permitted to intervene in that case, and the carrier parties are apparently eager to have the District Court's order purportedly "mandating" interchange stand. This injunctive order also appeared in the Record before this Court in *Brhd. of R. Trainmen v. Jacksonville Terminal Co., supra*, Case No. 69, O.T. 1968, Appendix pp. 36-46.

This interesting case is simply another seam in the web of ongoing litigation in the District Court, demonstrating further that that Court has plenary jurisdiction over the FEC dispute, the self-help of the parties, and the interchange which is the subject of this case. In another case currently pending in the District Court, *Brhd. of Locomotive Engineers, et al. v. Atlantic C. L. R. Co., et al.*, Case No. 65-352-Civ.-J, the unions are seeking declaratory relief as to the effect of the injunction entered in Case No. 63-16, and the Court has assumed jurisdiction of the case, although no decision has yet been rendered in the proceeding.

and essential to enjoin the enforcement of a subsequent state court temporary injunction, which prohibits the picketing under Florida state law, in order to protect and effectuate the Federal court's orders and in aid of the Federal court's jurisdiction.

The Jacksonville Terminal Picketing — In May, 1966, the picketing out of which the *Jacksonville Terminal* cases arose transpired at the premises of the Jacksonville Terminal Company. As noted in the opinion of this Court, the unions there involved, upon the FEC instituting its unilateral revision of rules, rates of pay and working conditions applicable to their crafts, "responded by calling a strike and thereafter by picketing the various locations at which FEC carried on its operations, including the premises of the respondent, Jacksonville Terminal Company." 394 U.S. at 371. As further noted by the Court, "FEC carries on substantial daily operations at the terminal, interchanging freight cars with the other railroads; it accounts for approximately 30% of all interchanges on the premises." 394 U.S. at 373.

While the *Jacksonville Terminal* litigation wound its slow way through the Florida appellate courts to this Court, on March 12, 1967 the last operating craft union which maintained "regular" contractual rights with the FEC, respondent Brotherhood of Locomotive Engineers (BLE), called a strike of its members against FEC in response to the FEC's identical unilateral revision of the rules, rates of pay and working conditions, this time applicable to locomotive engineers. This dispute had been fully processed through the procedures of the Railway Labor Act, and the FEC had declined binding arbitration, which BLE had accepted. (A. 58, 154-55)

Following the commencement of the strike, on April 23, 1967 while the state court injunction ultimately reversed by this Court was still in effect prohibiting picketing of the Jacksonville Terminal Co., BLE began to picket the employee entrance to the Moncrief Yard where all FEC interchange with the ACL daily takes place.

The Moncrief Yard Picketing — Whatever else may be said of the Moncrief Yard it obviously cannot be denied by petitioner that it is a regular daily situs of actual operations of FEC engines and trains operated by striker replacement crews. By agreement between the ACL and FEC certain designated tracks of ACL's Moncrief Yard are used as the interchange situs of *all interchange operations* between the two carriers. (A. 33-4, 38, 110) This is in contrast to the interchange operations conducted between FEC and the other two rail carriers with which it connected in the Jacksonville area at the time of the picketing, the Seaboard Air Line Railroad (SAL) and the Southern Railway Co. (Southern). As to these two carriers all interchange operations were carried on on the premises of the Jacksonville Terminal Company, (A. 59-60) and it is this interchange which was the subject of the 1966 picketing by the FEC's striking trainmen. As previously noted by this Court FEC interchange on the premises of the Terminal Company amounted to 30% of all interchange carried on there, and this amount represented approximately 40% of the total FEC interchange traffic. (A. 61) The remaining 60% of FEC interchange traffic was performed on the premises of the Moncrief Yard. (A. 61) This interchange traffic accounted for approximately 25% of the total number of cars handled in the Moncrief Yard by the ACL's estimate. (A. 121) FEC interchange in the Moncrief Yard was thus roughly equivalent to the FEC

interchange in the Terminal Company as a percentage of the total amount of traffic handled within each facility but the Moncrief interchange, was in fact much greater as a percentage of FEC's total traffic, i.e., 60%, as compared to 40% within the Terminal Company. In accordance with this arrangement, ACL makes payments to the FEC in an agreed amount for the FEC's extra services in making its pick up and deliveries of freight cars on the premises of the ACL, rather than upon the jointly owned premises of the Jacksonville Terminal Company. (A. 127) ACL and its employees, of course, perform all track maintenance and whatever additional maintenance is required in order to keep the designated interchange tracks serviceable. (A. 54)

With the merger of the Atlantic Coast Line Railroad Co. and the Seaboard Air Line Railroad Co. into the Seaboard Coast Line Railroad Co. (SCL), see, *Florida E. C. Ry. Co. v. United States*, 386 U.S. 544 (1967), *aff'ing*, 259 F.Supp. 993, which, of course, presently owns the Moncrief Yard, *all* interchange between FEC and SCL could today be performed in the Moncrief Yard thus virtually completely negating the effect of picketing at the Jacksonville Terminal Co. The FEC and SCL simply by shifting all interchange from the Terminal company into the yard of the non-struck carrier could thereby insulate this vital part of the struck carrier's operations from the effects of lawful self-help.[7]

[7]This quite obviously is the reason why no picketing has been instituted at the Jacksonville Terminal Co. even though this Court has determined that such picketing is lawful and protected self-help. Contrary to petitioner's assertions, respondent has no desire to "escalate" (Pet. Br. p. 50) the FEC dispute beyond the actual situs of FEC's interchange operations. If these can be halted there would be no reason, and respondents have disavowed any interest, (A. 27, 62, 137) in affecting any other rail movements.

On March 11 and 12, 1967, just prior to and on the day the BLE strike against FEC commenced, respondent J. D. Sims, the BLE official in charge of the strike met with ACL officials in an attempt to work out an arrangement which would with certainty confine the effects of BLE self-help activities solely to FEC interchange traffic. (A. 138-39; 140-141). In this regard BLE made several requests, each of which would have accomplished this desired result.

A) BLE requested ACL to shift the site of its interchange operations with FEC from Moncrief Yard onto the premises of the Jacksonville Terminal Company so that no FEC engines and crews would be operating in the Moncrief Yard. ACL management refused. (A. 139).

B) BLE requested permission to place pickets within the Moncrief Yard premises in order to picket the actual FEC movements within the Yard at the places where ACL employees actually came into contact with them. (A. 139, 141). This suggestion was rejected by ACL management as "* * * just so ridiculous that I couldn't consider it." (A. 141).

On the day the strike commenced, March 12, 1969, BLE placed pickets on the public railroad crossing at McQuade Street, which is the closest public location to the boundary between Moncrief Yard and the Jacksonville Terminal Company property to the south. (A. 40, 46, 112) FEC engines operated by striker replacement crews passing the crossing in order to make their pick-ups and deliveries in Moncrief Yard were totally unaffected by this picketing, however, SAL engines with freight destined to and from FEC interchange in the Terminal Company were stopped, with supervisory personnel being used to complete the movement into the Terminal Company. (A. 59-60)

In an effort to accomplish the desired goal of halting FEC's day to day operations carried out on the premises of the Moncrief Yard, the BLE on April 23, 1967, commenced the limited peaceful picketing and pamphleteering which is the subject matter of the present case. In marked contrast to the picketing which had been carried on in 1966 by the trainmen at the Jacksonville Terminal premises, neither the picket signs nor pamphlets requested ACL employees not to cross the line or to refuse to report to work. (A. 27, 32) The pickets were posted on public property outside the sole road entrance to the Moncrief Yard which was the only place where the pickets could contact the operating employees of ACL who were performing the interchange pick ups from and deliveries to the FEC within the confines of the Yard. (A. 94). ACL employees were requested to refuse to move "solid blocks" of FEC interchange, either on pick-up or delivery. (A. 61-62)

The actual effect of the picketing as portrayed in the Brief for Petitioner pp. 10-12, can only be called exaggerated. The picketing went on for a total of five days until a "truce" was arranged on Friday morning, April 28, 1967, pending the outcome of the state court proceedings. (A. 108). During this period of time, as fully catalogued in the state court testimony of M. C. Jennette, General Superintendant of Terminals for ACL (A. 94-102) a total of 16 "incidents" occurred involving 32 ACL employees. The first 13 "incidents" over the period from April 23-27, 1967, involved ACL operating personnel who refused to either make deliveries to or pick ups from the FEC interchange tracks. Upon their refusal to do so the ACL would "relieve" the individuals from duty until further notice, not permitting them to do any other work or return to work on the following days (A. 36, 108). During the final

morning of the picketing incidents involving two jobs occurred, in which individuals did refuse to switch a total of twelve cars destined for FEC from two cuts which contained other than FEC traffic. (A. 98-99). As to these movements supervisory personnel switched out the FEC destined cars. (A. 98). In one instance the employees were permitted to continue switching non-FEC destined cars, and in the other they were "relieved". (A. 98).

Finally, just a few hours before the "truce" which ended the picketing was effected on Friday, April 28, 1967, one road crew refused to man an outgoing train which contained cars received from FEC. (A. 101). The train departed 32 minutes late. (A. 117).

This one late road train, together with the ACL's estimate that it was, "approximately 12 or 16 hours behind with our terminal switching due to the congestion in the yard at the time this truce was called," (A. 119) was the total practical effect on ACL's Moncrief Yard operations of 5 days of the picketing involved herein. The claimed disastrous consequences of the picketing with which Petitioner's Brief (pp. 10-12) is replete, are simply not borne out by the record as to what actually occurred in the Yard.

Moreover, the so-called "Hot Car Program" (a slogan coined by the petitioner) has reference in fact solely to the two "incidents" involving 12 FEC destined cars on cuts which contained mixed FEC and non-FEC destined freight, and the one 32 minute late road train. (A. 98-99, 117) These individual instances occurring just prior to the cessation of activities on April 28, 1967, apparently were attributable to over-zealousness or misunderstanding on the part of individual ACL employees.

Obviously it was not the "avowed purpose" (Pet. Br. p. 12) of the respondents to close down the Moncrief Yard, as this result, had it been the purpose of the picketing could have been far more easily accomplished by the establishment of picket lines requesting employees not to cross as had been done at the Jacksonville Terminal Company. The purpose of the picketing as expressed by the responsible BLE officer was to stop only the FEC traffic (A. 62, 137).[8] Since all of the interchange movements performed by ACL operating personnel were done within the premises of the Moncrief Yard, the only place where the FEC picketing engineers could appeal to them was where they came to work at the Yard, and the only times of such appeals were during the crew changes at the Yard. (A. 31-2, 94). The futility of addressing such appeals to the FEC striker replacement crews as they with their trains entered Moncrief Yard across the McQuade Street crossing is obvious.

The Federal Court Picketing Case — This case was commenced by ACL on April 25, 1967, by the filing of a Complaint (A. 7-24) in the United States District Court for the Middle District of Florida, seeking an injunction combined with a specific prayer for general relief (A. 17, 20, 23), which under Rule 54(c), Federal Rules of Civil Procedure, of course, includes a claim for money damages, *Mungin v. Florida East Coast Ry. Co.*, 416 F.2d 1169, 1175 (5th Cir. 1969), as a result of the picketing activities of respondents at Moncrief Yard. The picketing was alleged to be in violation of the Railway Labor Act, 45 U.S.C. §151 et seq., and the Interstate Commerce Act, 49 U.S.C. §1

[8]The fact that stopping FEC traffic was the only purpose of the picketing was confirmed by ACL Terminal Superintendent Jennette:

"Q You understood, did you not that the purpose of this activity was only to stop FEC traffic?

A. That was my understanding; yes, sir." (A. 109)

et seq. The jurisdiction of the Court was specifically invoked by the plaintiff ACL, under 28 U.S.C. §§ 1331 and 1337.

The plaintiff's Motion for a Preliminary Injunction was brought on for hearing on the same day, and a full evidentiary hearing was held by the Court including the testimony of five ACL officials and of the BLE officer in charge of picketing (A. 25-63). The testimony of the ACL officials showed that FEC engines and crews daily operate across the tracks of the Jacksonville Terminal Company and onto the tracks of the Moncrief Yard where they deliver freight to and pick up freight from the ACL. In the words of L. T. Andrews, ACL General Manager:

> "The use of the Moncrief Yard tracks for interchange purposes, on the basis of the present day operations, is a part of the FEC operation."
>
> * * *
>
> "Q. And if they did not use it everyday they wouldn't get any freight from ACL?
> A. Not under the basis of the present operating conditions." (A 55-56)

On the basis of the evidence presented, the District Court on the following day, April 26, 1967 entered its Order denying the application of the ACL for temporary injunctive relief. (A. 64-68).

Although ACL repeatedly in its Brief (pp. 2, 12, 13, 19, 20, 35-40) characterizes this Order as simply involving a finding by the District Court that it was precluded by the Norris-LaGuardia Act, 29 U.S.C. §101 et seq., from

granting injunctive relief, examination of the five-page Order demonstrates that it was, in fact, as the District Judge himself later characterized it, a "delineation of rights of the parties" (A. 196) under controlling federal law, including Section 20 of the Clayton Act, 29 U.S.C. §52 (A. 67).

In this Order the District Court held that it had jurisdiction of the case under 28 U.S.C. §1337. (A. 66). The Court further specifically dealt with the ACL's contention that the respondents' picketing was in violation of the Railway Labor Act (A. 67) and rejected that contention.

Finally the Court held that in addition to the Norris-LaGuardia Act, Section 20 of the Clayton Act, 29 U.S.C. §52, was applicable to the conduct of the respondents. (A. 67). This section of the Clayton Act provides that the conduct specified within its terms which includes "* * * ceasing to perform any work or labor, or * * * recommending, advising, or persuading others by peaceful means so to do," and "peacefully persuading any person to work or abstain from working," shall not "* * * be considered or held to be violations of any law of the United States." 29 U.S.C. §52. *United States v. Hutcheson*, 312 U.S. 219 (1941).

In light of this finding, there can be no question that the District Court, as it later expressly stated, Order, June 19, 1969, (A. 196) delineated the rights of the parties to the case which was properly before the Court. No appeal was taken from this Order by ACL.

The State Court Injunction — Immediately following the entry of the April 26, 1967 Order by the Federal District Court, the ACL filed another Complaint in the

Circuit Court for the Fourth Judicial Circuit in and for Duval County, Florida, against respondents, seeking an injunction based upon state law against respondents' identical picketing activities. (A. 77-89)

As soon as the state court case was filed, respondents filed a removal petition in the Federal District Court. (A. 69-71) Since the facts alleged were, of course, identical with the facts from which the District Court had just found that it possessed federal question subject matter jurisdiction BLE urged the District Court to retain jurisdiction of the State Court case. Upon ACL's motion to remand (A. 72-73), however, the District Court entered its first directly non reviewable order of remand (A. 74) citing only a section of Moore's Federal Practice[9] which contained the conventional wisdom prevailing prior to this Court's decision in *Avco Corp. v. Aero Lodge No.* 735, 390 U.S. 557 (1968) regarding cases in which an alleged "cause of action" based solely upon inapplicable state law appeared, ignoring the applicable federal law, and as to which the Norris LaGuardia Act, 29 U.S.C. §101 et seq. applied.

Following the Order of Remand, hearing was held before the state court judge with the same witnesses giving the same testimony as had been adduced before the Federal Court, with the addition of testimony regarding the activity subsequent to the Federal Court hearing and prior to the April 28, 1967 "truce". (A. 90-143).

The state court entered its Order for Temporary Injunction on May 3, 1967 completely enjoining respondents'

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[9]IA Moore's Federal Practice, Para. 0.167(7) (2nd ed. 1965).

conduct based upon the application of Florida State law. (A. 144-151). The injunction was taken virtually verbatim from the state court's *Jacksonville Terminal* Injunction. (Compare A. 144-151, with Appendix pp. 79-82, *Brhd of R. Trainmen v. Jacksonville Terminal Co.*, Case No. 69, O.T. 1968.)

Following the entry of the state court's Temporary Injunction respondents sought again to remove the case to the Federal District Court (A. 152-54) in light of the Court of Appeals for the Sixth Circuit's decision in *Avco Corp. v. Aero Lodge No.* 735, 376 F.2d 337 (6th Cir. decided May 2, 1967). The District Court again remanded the case, in a second directly unreviewable Order (A. 157) citing no authority.

By agreement between counsel, no action was taken in the state court case while the companion litigation involving the trainmen's May, 1966 picketing of the Jacksonville Terminal Company made its way to this Court for determination of the scope of railway labor's self-help rights and the law (state, federal or both) applicable thereto.

The opinion of this Court in the companion litigation *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969) was issued on March 25, 1969 and rehearing was denied by the Court on May 5, 1969.

Following the denial of rehearing by this Court in the *Jacksonville Terminal* case, respondents moved in the state court for the dissolution of the state court injunction, (158-60) which was bottomed solely upon the application of Florida state law to respondent's picketing.

During the initial hearing in the state court on respondents' motion for dissolution, which took place on May 23, 1969, counsel for petitioner shifted their ground for upholding the state court's injunction to include a contention that the Railway Labor Act, 45 U.S.C. §151 et seq., as applied in the *Jacksonville Terminal* case was unconstitutional under the United States Constitution. (A. 170, 173-4). At this juncture counsel for respondents requested and were granted a recess by the state court judge and another Petition for Removal (A. 168-171) was thereupon filed in the Federal District Court, in that it was now manifestly apparent that the state court case was not based solely upon Florida State law, and, in addition, this Court's intervening decisions in *Avco Corp. v. Aero Lodge, No.* 735, 390 U.S. 557 (1968), and *Jacksonville Terminal* made it clear that the case was removable without regard to the express assertions of the petitioner. At the same time respondents filed an Answer (A. 163-67) to the Complaint in the present case which remained pending in the Federal District Court.

Subsequent to the recess, counsel for petitioner announced to the State Court its withdrawal of "any arguments under the United States Constitution and announced that they waived their right to raise such arguments subsequently at either the trial or appellate level * * *." (A. 174). Petitioner also claimed that its "waiver" of constitutional argument was prior in time to the filing of the Removal Petition. (A. 174). For the third time in the case, after hearing, however, the District Court entered its directly unreviewable Order of Remand on May 28, 1969 (A. 175) again citing no authority.

Following remand a second hearing was held on May 29, 1969 before the state court judge on the Motion to Dissolve the injunction. At this hearing the state court judge openly revealed his recalcitrance. (See, colloquy between Court and counsel quoted, *infra*, at page 35). In a remarkable "Letter Opinion" (A. 181-82), the judge announced his intention to continue his injunction based upon Florida state law, "distinguishing" away the *Jacksonville Terminal* decision of this Court in the face of what even he termed the "final conclusion" of this Court. (A. 181)

Presented with this display of complete recalcitrance on the part of the state court, respondents then filed a Motion for Preliminary Injunction in the pending Federal District Court picketing action against the Petitioner's enforcement of the state court injunction, which clearly flouted and nullified the previously entered Order of the District Court of April 26, 1967, and impinged upon and violated the jurisdiction of the District Court to finally determine the rights of the parties to the case then pending before it under controlling federal law, which seriously interfered with the District Court's jurisdiction to enforce its bargaining orders entered in *United States v. Florida E.C. Ry. Co., supra*, together with its jurisdiction assumed in *Florida E.C. Ry. Co. v. Jacksonville Terminal Co. et al.*, Case No. 63-16-Civ-J, U.S.D.C., M.D., Fla., where it had entered an injunction which purportedly "mandated" (Pet. Br. p. 46) FEC-ACL interchange, and the jurisdiction assumed in the pending case of *Brhd. of Locomotive Engineers et al. v. Atlantic C. L. R. Co. et al.*, Case No. 65-352-Civ-J, U.S.D.C. M. D., Fla., to determine the effect of the injunction entered in Case No. 63-16 upon striking employees and employees of connecting carriers.

On June 19, 1969 the District Court entered the Order which is the subject of the Petition, enjoining the ACL from giving effect to the state court injunction. (A. 194-96)

Following the entry of the District Court's Order of June 19, 1969, the petitioner sought a stay pending appeal from the District Court, from a single judge of the Court of Appeals, and from a three judge panel of the Court of Appeals. All were unanimous in denying the requested stay. The Court of Appeals panel also denied an application for stay pending certiorari.

On July 15, 1969, petitioner presented an application for stay to Mr. Justice Black, who granted a stay of enforcement of the District Court's Order pending the petition for certiorari, and, if granted, pending the Court's judgment, on July 16, 1969. 90 S.Ct. 9 (1969) Meanwhile the Court of Appeals on July 17, 1969 entered its judgment of affirmance of the District Court's Order, based upon a stipulation of the parties which had been filed on July 16, 1969. (A. 238-39). This Court granted certiorari on November 10, 1969.

SUMMARY OF ARGUMENT

A. *The injunctive Order of the District Court dated June* 19, 1969 *is specifically authorized under* 28 *U.S.C.* §2283 *and is not in conflict with Amalgamated Clothing Workers of America v. Richman Brothers*, 348 *U.S.* 511 (1955).—This case turns upon the power of a Federal District Court to protect its plenary jurisdiction and its

orders in a uniquely complex dispute arising under the Railway Labor Act. The District Court for the Middle District of Florida, Jacksonville Division, has assumed jurisdiction and has entered orders in a large number of cases arising out of the "major disputes" between the Florida East Coast Railway Co. (FEC) and the labor organizations representing its employees. Among these are cases in which the District Court:

a) is administering on a regular basis the "reasonably necessary exceptions" from collective bargaining agreements allowable to the FEC in the exercise of its self-help rights, *United States v. Florida E. C. Ry. Co.*, Case No. 64-107-Civ-J, Order dated October 30, 1964, *aff'd*, 348 F.2d 682 (5th Cir. 1965), *aff'd, sub nom. Brhd. of Ry. & S.S. Clerks v. Florida E.C. Ry. Co.*, 384 U.S. 238 (1966);

b) has ordered the FEC to bargain in good faith with its labor organizations, *Id.*;

c) has entered an order purportedly "mandating" (Pet. Br. P. 46) the carriers which perform interchange with the FEC to continue to do so, *Florida E.C. Ry. Co. v. Jacksonville Terminal Co., et al.*, Case No. 63-16-Civ-J, U.S.D.C., M.D. Fla., Order of January 30, 1963;

d) has assumed jurisdiction of a case brought by the labor organizations to determine the effect of this purported "mandatory" order upon the striking employees of the FEC, and upon the employees of the connecting carriers, *Brhd. of Locomotive Engineers et al. v. Atlantic Coast Line R. Co. et al.*, Case No. 65-352-Civ-J, U.S.D.C. M.D. Fla.; and

e) has entered an order in the present case finding the self-help picketing and pamphleteering carried on by respondents to be lawful and protected under controlling Federal law; *Atlantic C. L. R. Co. v. Brhd. of Locomotive Engineers*, Case No. 67-335-Civ-J U.S.D.C. M.D. Fla., Order April 26, 1967.

In these circumstances the District Court acted appropriately "where necessary in aid of its jurisdiction" and "to protect or effectuate its judgments", 28 U.S.C. §2283, by enjoining the enforcement of a state court injunction based solely upon inapplicable state law which proscribed the identical self-help activities which the District Court had previously found to be lawful and protected under federal law, and which were within the scope of activity protected from state proscription by this Court's decision in *Brhd. of R. Trainmen v. Jacksonville Terminal Co., supra.* The state court injunction also interfered with the District Court's plenary jurisdiction over the interchange which it purportedly "mandated" in 1963, and has assumed jurisdiction to determine the effect of this order on employees of the struck and non-struck carriers. The state court injunction also infringed upon the District Court's jurisdiction and its enforcement of its orders requiring good faith bargaining on the part of FEC.

Section 2283 was revised in 1948 in order to restore, "the basic law as generally understood and interpreted prior to the Toucey decision." 80th Cong. H. Rep. No. 308. The permissibility of injunctions restraining state proceedings in order to protect a Federal District Court's jurisdiction and orders had been recognized prior to and in this Court's decision in *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 138 (1941), *Looney v. Eastern Texas R. Co.*, 247 U.S. 214 (1918).

Amalgamated Clothing Workers of America v. Richman Brothers, 348 U.S. 511 (1955), is inapplicable here. That decision involved no history of previously assumed jurisdiction and numerous orders by the District Court in cases involving the labor dispute, "interchange", and picketing which was the subject matter of the state court action, and upon which the state court order infringed. Moreover that decision turned upon the lack of subject matter jurisdiction in the Federal District Court, since that Court, as well as the state court was *preempted of jurisdiction* by the exclusive primary jurisdiction of the NLRB.

The Federal District Court below is the rightful forum for the adjudication of self-help rights under the Railway Labor Act. That Court is entitled to protect its jurisdiction and its orders in the circumstances of these cases arising under the Railway Labor Act from infringing state court action. *United Industrial Workers v. Board of Trustees of Galveston Wharves*, 400 F.2d 320 (5th Cir. 1968), *cert. denied*, 395 U.S. 905 (1969).

B. *The picketing involved in the present case is protected by the rationale of this Court's decision in Brhd. of R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969); The Moncrief Yard in which FEC engines, operated by striker replacement crews, daily operate in order to perform all ACL-FEC interchange was found by the District Court below to be, "an integral and necessary part of FEC's operations," (A. 66, 195). As such, it clearly presents a "common situs" situation substantially identical with the Jacksonville Terminal Co. Every effort was made by respondents to confine the effects of the picketing solely to FEC interchange traffic. The stopping of FEC interchange traffic was the sole purpose of the picketing, and

this was acknowledged by ACL management. (A. 27, 62, 137, 109). If anything the picketing involved herein is more "primary" in character than that before the Court in *Jacksonville Terminal*, for the pickets did not request ACL employees not to cross, but merely not to perform the interchange movements which were connected with the FEC's normal business operations. See also. *Local* 761, *IUE v. NRLB*, 366 U.S. 667 (1961), *United Steelworkers v. NLRB*, 376 U.S. 492 (1964).

In any event the basis of the *Jacksonville Terminal* decision was the institutional unsuitability of the courts, rather than the Congress, to legislate the limits of economic self-help allowable to the parties who have exhausted the procedures of the Railway Labor Act. The state court's "distinction" of the *Jacksonville Terminal* decision, confining that case to its precise facts as reflected in his "Letter Opinion" (A. 181-82) is not supportable.

C. Brotherhood of R. Trainmen v. Jacksonville Terminal Co., 394 *U.S.* 369 (1969) *ought not be summarily overruled* — As pointed out above, the picketing carried on in the present case at the Moncrief Yard "common situs" was, if anything, more "primary" in character than the picketing involved in *Jacksonville Terminal*. While to be sure, the Court was narrowly divided in that decision, a precedent of virtually immediate reversal of a decision by this Court, in the circumstances of this case, would have undesirable effects upon the administration of justice far transcending the importance of this case.

There has been no "escalation" (Pet. Br. p. 50) by the labor organization parties to the FEC dispute, beyond the area where FEC trains, operated by striker replacement

crews, actually and daily operate in the face of lawful strikes. It is appropriately for the Congress and not the courts to legislate "the balance to be struck between the uncontrolled power of management and labor to further their respective interests'. * * * The Congress has not yet done so." 394 U.S. at 392.

D. The Norris-LaGuardia Act 29 U.S.C. §101 et seq., did not prohibit the District Court's injunction under the circumstances of this case. —

The injunction entered by the Federal District Court below to stay proceedings in the state court, "where necessary in aid of its jurisdiction" and "to protect or effectuate its judgment" 28 U.S.C. §2283, was not prohibited by the Norris-LaGuardia Act under the facts of this case. In so holding the Court need not go so far as did the Court of Appeals for the Seventh Circuit in *Brhd. of Locomotive Engineers v. Baltimore & O. R. Co.*, 310 F.2d 513, 517-18 (7th Cir. 1962), holding Norris-LaGuardia to be inapplicable to "employers of labor", 29 U.S.C. §102, except where the statute specifically so provides. (We do submit, however, that this holding was a proper construction of the statute.)

The holding of this Court in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457-59 (1957) provides more than ample justification for finding the injunction at bar to be without the ambit of Norris-LaGuardia. An injunction staying state proceedings where necessary in aid of the District Court's jurisdiction, and to protect or effectuate its orders entered in many cases involving all aspects of the FEC dispute, was not "a part and parcel of the abuses against which the [Norris-LaGuardia] Act was

aimed." 353 U.S. at 458. The procedural requirements and findings of Section 7 of the Act are equally "inapposite" 353 U.S. at 458, here as in *Lincoln Mills*. Moreover the injunction does not run afoul of Section 4(d) of the Act as claimed by petitioner, even giving the statutory language a totally literal reading.

The injunction here entered while "*in form*" (Pet. Br. p. 24 fn. 1) running against the ACL, is in fact intended to restrain the state court from proceeding, and that court clearly cannot be considered a "person participating or interested in a labor dispute" 29 U.S.C. §113(b) under any view of Norris-LaGuardia.

Finally, the District Court's injunction acted to enforce respondent's self-help rights arising under the Railway Labor Act, for the protection of which this Court has frequently held the Norris-LaGuardia Act to be inapplicable. *E.g., Virginian Ry. Co. v. System Federation No.* 40, 300 U.S. 515 (1937); *Brhd. of R. Trainmen v. Howard*, 343 U.S. 768 (1952); *Brhd. of R. Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. 30 (1957).

ARGUMENT

A. The Injunctive Order of the District Court dated June 19, 1969 is specifically authorized under 28 U.S.C. §2283 and is not in conflict with *Amalgamated Clothing Workers of America v. Richman Brothers*, 348 U.S. 511 (1955)

This case turns upon the power of the Federal District Court to protect its plenary jurisdiction and its orders in a uniquely complex dispute arising under the Railway Labor

Act. The litigation which has been carried on in the United States District Court for the Middle District of Florida over the past seven years, involving the FEC disputes, has virtually achieved a life of its own. As stated by Chief Judge Brown for the Fifth Circuit Court of Appeals in that Court's latest FEC dispute opinion, *Mungin et al. v. Florida E. C. Ry. Co.*, 416 F.2d 1169, 1170 (1969):

> "Now rounding out a decade of Industrial strife as the Nation's longest railroad strike against FEC, the history of which has been memorialized in a dozen or more Court opinions, the tenth year of that turmoil once again puts Judges in the 'locomotive cab.'"

The Judges of the District Court for the Middle District of Florida, Jacksonville Division, have occupied the "locomotive cab" in connection with the FEC disputes at least since 1964, when the Court of Appeals in an opinion by Judge Brown fashioned the doctrine of judicially allowable "reasonably necessary exceptions" to the collectively bargained terms and conditions of employment, which would permit the carrier to operate in the face of lawful strikes by its employees. *Florida E.C. Ry. Co. v. Brotherhood of Railroad Trainmen*, 336 F.2d 172 (5th Cir. 1964), *cert. denied*, 379 U.S. 990 (1965). This doctrine was later approved by this Court in *Brotherhood of Ry. & S. S. Clerks v. Florida E. C. Ry. Co.* 384 U.S. 238 (1966), *aff'ing*, *Florida E. C. Ry. Co. v. United States*, 348 F.2d 682 (5th Cir. 1965). Since the mandate of this Court came down to the District Court in May of 1966 affirming that Court's injunction, the District Court has undertaken to enforce and administer its injunctive order which includes, *inter alia*, a mandatory requirement that the FEC "bargain in good faith with the labor organizations representing the

crafts or classes of FEC's employees". (See Supreme Court Record, Vol. I p. 191, *Brhd. of Ry. & S. S. Clerks v. FEC, supra*; this order is also reproduced in *Mungin v. FEC*, 416 F.2d 1169, 1172-73 fn. 16 (5th Cir. 1969)).

This suit, *United States v. Florida E. C. Ry. Co.* No. 64-107-Civ-J, U.S.D.C. M.D. Fla., which was brought and continues to be actively prosecuted by the United States Government as well as the intervening unions has remained pending in the District Court upon issues of FEC violations and contempt of the Court's Orders,[10] FEC bad faith in bargaining with its unions, "reasonably necessary" self-help allowable to FEC, and the complete suitable relief and sanctions to be ordered for FEC's past and continuing violations of the "status quo" provisions of the Railway Labor Act and the Court's Orders. This litigation is continuing in nature with lengthy hearings having been held at regular intervals over the past years since this Court's mandate was issued.

Moreover the interchange between the FEC and its connecting carriers with which this case is concerned, has been the subject of cases pending in the District Court since the first week of the first FEC strike seven years ago. In *Florida E. C. Ry. Co. v. Jacksonville Terminal Co., et al.*, Case No. 63-16-Civ-J, U.S.D.C. M.D. Fla., the District Court entered an order on January 30, 1963, which the petitioner is still claiming in its Brief in the present case "mandated" (Pet. Br. p. 46) the continuance of the interchange between the FEC and its connecting carriers. This order is also the subject of another case pending in the District Court, *Brhd. of Locomotive Engineers et al v. Atlantic C. L. R. Co. et al.*, Case No. 65-352-Civ-J, U.S.D.C. M.D. Fla., in which the labor organizations including re-

[10]See footnote 2, *supra*, p. 4.

spondent BLE are seeking a construction of the 63-16 Order to determine its effect, if any, upon striking employees and the employees of connecting carriers. The 63-16 injunction, which was a topic of discussion in the opinion of the Court of Appeals for the Fifth Circuit in *Brhd. of R. Trainmen v. Atlantic C.L.R. Co.*, 362 F.2d 649, 651 (5th Cir. 1966), *aff'd* 385 U.S. 20 (1966), and was also before this Court in the latest *Jacksonville Terminal* case, (Appendix, pp. 36-46, *Brhd. of R. Trainmen v. Jacksonville Terminal Co.* Case No. 69, O.T. 1968) together with the case pending to construe it, obviously indicate the extent of jurisdiction assumed by the District Court in connection with the FEC interchange, in addition to that assumed in the case at bar.

It is within this context of assumed plenary jurisdiction over the continuing litigation involving the administration and supervision by the District Court of the parties to the FEC's disputes, characterized by Chief Judge Brown as the District Court's "railroad duties" *Mungin v. FEC*, 416 F.2d at 1174, and its interchange with connecting carriers, that the District Court Order which is the subject of the present appeal must be viewed.

As a result of the earlier Federal, then later State Court injunctions which have been entered enjoining the self-help activities of the labor organization parties to the FEC dispute, labor's right of economic self-help in this dispute has become, in effect, academic.[11] Compare, *Brotherhood of Ry. & S.S. Clerks v. F.E.C.*, 384 U.S. at 246. For

[11] For example in an article appearing in the Monday, February 2, 1970 edition of the Miami News, headlined "FEC shows $2.3 million in '69 profits", FEC President W. L. Thornton is reported as follows:

> "Thornton claimed that while the railroad is entering the eighth year of a strike by some unions, as a practical matter no one is really aware of the strike." Miami News, February 2, 1970, p.9-A.

where the carrier by its past and continuing violations of the Railway Labor Act has completely negated the economic effects of the withdrawal of services of its employees, the remaining weapon in labor's arsenal is peaceful picketing:

> "'* * * aimed at applying economic pressure by halting the day-to-day operations of the struck employer, '*Steel-workers v. NLRB*, 376 U.S. 492, 499, (1964); and protected primary picketing 'has characteristically been aimed at all those approaching the situs whose mission is selling, delivering, or otherwise contributing to the operations which the strike is endeavoring to halt,' *ibid.*, including other employers and their employees." *Brhd. of R. Trainmen v. Jacksonville* Terminal Co., 394 U.S. at 388 (1969).

This is nothing more nor less than what the BLE has sought to accomplish by its picketing and pamphleteering at the Moncrief Yard where FEC's daily interchange with ACL (and now SCL) is performed.

The District Court below held specifically in the Order from which this appeal was taken that:

> "[I]n its Order of April 26, 1967, this Court found that Plaintiff's Moncrief Yard, the area in question, is an integral and necessary part of [Florida East Coast Railway Company's] operations." (A. 195).

There was more than ample evidence before the Court to support this factual finding, based upon FEC's day-to-day use of the Moncrief Yard as the actual situs of all of its interchange operations with the ACL, amounting at the time of the 1967 hearing to 60% of FEC's total

traffic, and by ACL's estimate approximately 25% of all cars handled in the Moncrief Yard. (A. 61, 121). The complaints of the petitioner that picketing was not "confined to the places where the interchange was effected or restricted to times when FEC employees were on the premises," Pet. Br. pp. 46-47, are simply the result of the petitioner's adamant refusal to permit the pickets to enter the Moncrief premises so as to place their line where the FEC engines operate and interchange is effected. (A. 141). Obviously a picket line which appeared at the Moncrief employee entrance after the ACL employees actually performing the interchange moves had already reported for work and were picking up and delivering the FEC traffic would be an appeal addressed to no one. Contrary to the ACL's assertions every effort was made by BLE both by way of requests to the ACL management prior to the commencement of picketing, and by the requests made to the ACL employees by the actual picketing and pamphleteering to confine the effects of the picketing, in so far as possible, solely to the FEC interchange, and the ACL management acknowledged that this was the purpose of the picketing. (A. 109)

The discussion of this Court in its *Jacksonville Terminal* opinion last spring, regarding the difficulty of formulating generalizations governing "common situs" picketing even under the detailed legislative principles available in industries governed by the Labor Management Relations Act, 29 U.S.C. §158(b)(4), made clear that:

> "* * * *secondary employers are not necessarily protected against picketing aimed directly at their employees.* In Local 761, International Union of Electrical Radio and Machine Workers, A.F.L.-C.I.O. v. NLRB, supra, for example, we

noted that striking employees could picket at a gate on the struck employer's premises which was reserved exclusively for employees of the secondary employer, to *induce those employees to refuse to perform work for their employer which was connected with the struck employer's normal business operations.* The Court affirmed this principle in United Steelworkers of America, A.F.L.-C.I.O. v. NLRB, supra, where it held that *striking employees could picket to induce a neutral railroad's employees to refuse to pick up and deliver cars for the struck employer — even though the picketed gate was owned by the railroad, and the railroad's employees would have to pass by the place of picketing to pick up and deliver cars for other plants that were not struck.*" 394 U.S. at 389. (Emphasis added).

But this Court's opinion goes on in its concluding section, designated Roman Numeral VIII, to specifically hold:

> "Nor can we properly dispose of this case simply by undertaking to determine to what precise extent petitioners' picketing activities would be protected or prohibited under the terms of the Labor Management Relations Act. For although, in the absence of any other viable guidelines, we have resorted to the LMRA for assistance in mapping out very general boundaries of self-help under the Railway Labor Act, there is absolutely no warrant for incorporating into that Act the panoply of detailed law developed by the National Labor Relations Board and courts under §8(b)(4)."

"Moreover, from the point of view of industrial relations, our railroads are largely a thing apart. * * *' The railroad world is like a state within a state.'" * * * Thus, if Congress should now find that abuses in the nature of secondary activities have arisen in the railroad industry, see N. 10 *supra*, it might well decide — as it did when it considered the garment and construction industries, see LMRA §8(e) — that this field requires extraordinary treatment of some sort. * * * Certainly it is for Congress, and not the courts, to strike 'the balance to be struck between the uncontrolled power of management and labor to further their respective interests." * * * The Congress has not yet done so.

"In short, we have been furnished by Congress neither usable standards, nor access to administrative expertise in a situation where both are required. In these circumstances there is no really satisfactory judicial solution to the problem at hand. However, we conclude that the least unsatisfactory one is *to allow parties who have unsuccessfully exhausted the Railway Labor Act's procedures for resolution of a major dispute to employ the full range of whatever peaceful economic power they can muster, so long as its use conflicts with no other obligation imposed by federal law.* Hence, until Congress acts, picketing — whether characterized as primary or secondary — must be deemed conduct protected against state proscription. * * * *Any other solution — apart from the rejected one of holding that no conduct is protected — would involve the courts once again in a venture for which they are institutionally unsuited.*" 394 U.S. at 391-93. (Emphasis added)

Yet, in the face of this carefully worded holding by this Court, delimiting with precision the area which has been "protected against state proscription" and, as this Court earlier pointed out in its opinion, protected conduct "refer[s] to employee conduct which the States may not prohibit," 394 U.S. at 382, fn. 17, the Duval County Circuit Judge in his remarkable letter opinion (A. 181) refused to dissolve his Temporary Injunction proscribing the BLE picketing based solely upon the application of Florida State law. The following colloquy between Counsel for Petitioner and the Duval County Circuit Judge during the Hearing on the Motion for Dissolution, May 29, 1969 clearly demonstrates the recalcitrance displayed by the State Court:

> "Mr. Friedmann:
>
> First, I believe they are asking this Court to view the decision of the Supreme Court in Trainmen versus Terminal Company somewhat in the nature of a law review article to the extent that they spend some 10 or 12 pages discussing the Labor Management Relations Act, and discussing what is and what is not a common situs, and totally disregard that discussion and the conclusions they arrived at in this discussion.
>
> Secondly, I believe they are asking this Court to believe or to hold that the present United States Supreme Court believes or feels that it is incapable of making decisions in this area. I believe the history of the Court—
>
> *The Court: I don't believe I should go on record as giving my opinion of the Supreme Court.*
>
> Mr. Friedmann: All right, sir." (A. 177)

It was only after the Duval County Circuit Judge refused to dissolve or modify his Temporary Injunction of May 3, 1967, in light of this Court's *Jacksonville Terminal* opinion that respondents applied to the Federal District Court for injunctive relief against the enforcement of the state court temporary injunction. This injunction which effectively eliminated BLE's self-help rights based solely upon inapplicable state law, plainly violated the District Court's plenary jurisdiction over the FEC dispute assumed in the pending case of *United States v. Florida E.C. Ry. Co., supra,* and nullified the District Court's earlier order denying the ACL's Motion for injunctive relief in the pending case filed in the District Court by ACL against BLE based upon the identical facts. Also the injunction infringed upon the jurisdiction of the District Court over FEC interchange *Florida E. C. Ry. Co. v. Jacksonville Terminal Co., et al.,* Case No. 63-16-Civ-J USDC MD Fla., where the Court had entered an order purportedly "mandating" interchange (Pet. Br. pp. 46-7) on January 30, 1963. Moreover, the District Court had earlier assumed jurisdiction of a case filed by the unions, *Brhd. of Locomotive Engineers, et al. v. Atlantic C. L. R. Co. et al.,* Case No. 65-352-Civ-J, to determine the effect of the 63-16 injunction upon FEC's striking employees, and the employees of the connecting carriers.

The District Court entered the injunctive Order from which this appeal was taken on June 19, 1969 expressly as, "necessary in aid of its jurisdiction", and "to protect or effectuate its judgments", within the express terms and meaning of 28 U.S.C. §2283.

Section 2283 of the Judicial Code, and its predecessors have never been limitations upon the jurisdiction of the Federal Courts, but have been "recognized as merely

a limitation on general equity powers,". *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 154 fn. 24 (dissenting opinion). *Accord, Smith v. Apple*, 264 U.S. 274 (1924).

As explained by Chief Judge Haynsworth of the Court of Appeals for the Fourth Circuit:

> "It [Section 2283] is a limitation upon the exercise by a District Court of its equity jurisdiction. * * * Since the Statute was fathered by the principles of comity, it has been held that the statute should be read in the light of those principles and, though absolute in its terms, is inapplicable in extraordinary cases in which an injunction against state court proceedings is the only means of avoiding grave and irreparable injury." *Baines v. City of Danville*, 337 F. 2d 579 (4th Cir. 1964), *cert. den.* 381 U.S. 939, *aff'd.* 384 U.S. 890 (1966).

The prohibition embodied in the present Section 2283, has had a long and exceedingly complex development, as the Federal Courts following the Civil War fashioned certain "implied" exceptions to the then absolute statutory language. See Warren, *Federal and State Court Interference*, 43 Harv. L. Rev. 345 (1930). This process received a set back in the decision of this Court in *Toucey v. New York Life Ins. Co.*, 314 U.S. 118 (1941) which held that there was no warrant in precedent, and this Court would not recognize an "implied" exception to permit the Federal Courts to enjoin the "relitigation" in State Courts of cases heard in the Federal Courts. Mr. Justice Reed's vigorous dissenting opinion in *Toucey*, how-

ever, carried the day in the Congress.[12] In the 1948 codification and revision of the Judicial Code, the present Section 2283 was enacted. The Reviser's Note to the Section specifically states that "the revised section restores the basic law as generally understood and interpreted prior to the Toucey decision," 80th Cong. H. Rep. No. 308, by the addition of the statutory phrase, "*to protect or effectuate its judgments.*" In addition the statutory phrase "*where necessary in aid of its jurisdiction*" was added to the statute, according to the Reviser's Note "to conform to Section 1651 of this title * * *". Section 1651[13] is, of course, the All-Writs Statute.

This statutory history is relevant here primarily as an aid to the construction of Section 2283 which has been described by this Court as "an ambiguous statute when the aids to construction are so meagre". *Leiter Minerals v. United States*, 352 U.S. 220, 226 (1957). The restoration by Congress of "the basic law as generally understood and interpreted prior to the Toucey decision", Reviser's Note, *supra*, is relevant in that one of the leading decisions analyzed by the Court in both the majority and dissenting opinions in *Toucey* has, we submit, great significance to the present case. This decision is *Looney v. Eastern Texas R. Co.*, 247 U.S. 214 (1918). While *Looney*

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[12]With *Toucey v. New York Life Ins. Co.*, 314 U.S. 118 (1941) having been expressly repudiated by the Congress in the 1948 revision of §2283, Petitioner's repeated reliance upon the philosophy expressed in the majority opinion must be viewed with some suspicion. (Pet. Br. pp. 25-26).

[13]28 U.S.C. §1651

(a) The Supreme Court and all Courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

was not considered a "relitigation" case by the *Toucey* majority, neither was its authority questioned. The analysis of *Looney* by Mr. Justice Frankfurter for the majority in *Toucey* was as follows:

> "Looney v. Eastern Texas R. Co., 247 U.S. 214 was not a 'relitigation' case. The Texas federal district court, in a suit brought by various carriers, granted a preliminary injunction restraining the State Attorney General from proceeding to assess fines and penalties upon them for complying with an order of the Interstate Commerce Commission. The Attorney General nevertheless instituted proceedings in a state court to enjoin the carriers from complying with the Commission's order, and a supplemental bill was filed in the federal court to stay the proceedings. The district court issued the injunction, and this Court dismissed an appeal under §266, 28 U.S.C.A. §380, holding that the injunction below was not based upon the unconstitutionality of the Texas State Statutes, but *was granted merely to protect its jurisdiction until the suit brought by the carriers was finally settled.*" 314 U.S. at 138. (Emphasis added)

Mr. Justice Reed's opinion for the *Toucey* dissenters similarly analyzes the *Looney* decision as follows:

> "This Court now lays the Looney case aside as not being a 'relitigation' case. While the injunction in the Looney case was not in aid of a decree it was in aid of jurisdiction taken to determine a Texas rate controversy. A temporary injunction had been entered to maintain the status quo until a review by the Interstate Commerce Com-

> mission. *A temporary injunction may well be likened to a decree and entitled to the same protection against relitigation. Such was evidently this Court's view.* It said 247 U.S. at page 221, 38 S. Ct. at page 462, 62 L. Ed. 1084: "So important is it that unseemly conflict of authority between state and federal courts should be avoided by maintaining the jurisdiction of each free from the encroachments of the other that Section 265 of the Judicial Code, Revised Statutes, Section 720, Act of March 2, 1793, c. 22, 1 stat. L. 334, has repeatedly been held not applicable to such an injunction." 314 U.S. at 151-2. (Emphasis added)

Looney then is a case in which a Federal District Court, having properly assumed subject matter jurisdiction over a controversy subject to controlling federal law, and not involving a *res* of any type, was held by this Court to be warranted in enjoining the state proceedings, "in aid of its jurisdiction", and "to protect or effectuate its judgments" in the language of the current statute.

The Reviser's Note concerning the "in aid of jurisdiction" exception to Section 2283 says nothing about its confinement to cases involving a *res*. Moreover, the dictum appearing in this Court's opinion in *Kline v. Burke Construction Co.*, 260 U.S. 226 (1922) often cited for the proposition that the "in aid of jurisdiction" exception is confined to interference with a Federal Court's "*in rem*" jurisdiction, does not support this proposition. In *Brown v. Pacific Mut. Life Ins. Co.*, 62 F. 2d 711 (4th Cir. 1933), Circuit Judge Parker explained the *Kline* decision:

> "And upon further consideration of the Kline case we find nothing in it which limits to actions in rem the right of a federal court of equity to protect its jurisdiction. It involved no situation where it was necessary for a court of equity to protect against encroachment on its jurisdiction or the lawful effect of its orders and decrees but merely one where independent proceedings were pending in state and federal courts, in both of which the ultimate relief sought was a money judgment." 62 F. 2d at 713.

This Court's decision in *Amalgamated Clothing Workers of America v. Richman Brothers*, 348 U.S. 511 (1955) said by Petitioner to be controlling in this case and to prohibit the District Court's Order of June 19, 1969, must be considered against this background of the litigative history in the District Court of the FEC dispute, and of the origins of Section 2283.

The first and most obvious distinction between the present case and *Richman Brothers* is that unlike the present case there had been and was no extensive litigation pending in the United States District Court for the Northern District of Ohio involving the dispute between the Clothing Workers and the Richman Brothers. Indeed, the sole action involving the dispute which had been taken by the Ohio District Court prior to its denial of an injunction against the state proceedings, was to hold in a removal proceeding that it possessed no subject-matter jurisdiction on the ground that it was *preempted of jurisdiction* by the exclusive jurisdiction of the National Labor Relations Board. There was no history, such as is present in this case, of seven years of litigation pending in the District Court, involving mandatory injunctive orders

culminating in three decisions by this Court, concerning the self-help rights of the carrier, and of the union parties to the FEC dispute. Moreover, there had been no mandatory injunction in *Richman Brothers* requiring good faith bargaining on the part of a carrier subject to the Railway Labor Act with regular administration and supervision of the self-help allowable to the carrier in order to effectuate *its* right of self-help. Also, in contrast to the present case, there, of course, had been no Order previously entered by the District Court in *Richman Brothers* after a full evidentiary hearing, which made factual findings from the evidence concerning the picketing which was the subject of the later state court order and which delineated the self-help rights of the union party in its dispute with a carrier under controlling federal law.[14] Nor were there

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[14]While the Petitioner was successful in convincing the District Court to remand the state court proceeding on each of the three occasions when it was removed by Respondents, these directly unreviewable orders of remand 28 U.S.C. §1447(d), were each, we submit, clearly erroneous under this Court's decision in *Avco Corporation v. Aero Lodge No. 735*, 390 U.S. 557 (1968), together with this Court's *Jacksonville Terminal* decision. In *Avco* as here the company claimed that their state court action was allegedly based solely upon a state created right, and that the Federal District Court therefore did not possess "original jurisdiction" within the removal statutes. 28 U.S.C. §§1441(a) (b).

Although the District Court here involved had held in the pending action that it *did* have subject-matter jurisdiction under 28 U.S.C. §1337 (A. 66) based upon the identical operative facts which formed the basis of the state case, it nonetheless remanded the case to the state court; and it did so even after this Court's decision in *Jacksonville Terminal* held that state law was preempted from application in Railway Labor Act self-help controversies, and after the Petitioner shifted its ground in state court to include a Federal constitutional claim, later waived. (A. 173-74). See discussion *supra* at pp. 19.

Removal, if allowed, would of course have precluded the necessity for the injunction against the state proceedings later granted by the District Court. Since orders of remand cannot be directly reviewed unless they are denied, we respectfully and earnestly submit that, in the interests of sound judicial administration, the removability of the case at bar should be ruled upon by the Court.

cases pending involving an injunction purportedly "mandating" interchange, and a case filed to obtain a construction of that injunction as it affected employees of the struck and non-struck carriers.

Since this extensive history of litigation and District Court orders were not present in *Richman Brothers*, no consideration was given by the Court to the specific statutory exception "to protect or effectuate its judgments", which we discuss in detail, *infra*, at pp. 49-51.

Richman Brothers turns rather on the specific statutory exception to §2283 which permits a District Court to issue injunctions, "where necessary in aid of its jurisdiction."[15] In this connection the Court distinguished the jurisdictional stance of *Richman Brothers* from that which it had found in *Capital Service, Inc. v. NLRB*, 347 U.S. 501 (1954), where an injunction against state court proceedings sought by the NLRB had been granted and af-

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[15]This view is in accordance with that taken by Professor Moore, who, as pointed out by Petitioner was consultant to the Revisers of §2283 (Pet. Br. p. 34 n. 5):

> "The second exception permits a federal court to grant an injunction against state proceedings 'where necessary in aid of its jurisdiction'. This puts back into §2283 some of the judicial flexibility, which *Toucey* had removed from the statute. And despite the strict reading of §2283 by the *Richman* case, flexibility still remains for *Richman*, as we shall see, held only that the district court there had no jurisdiction to aid. But if, on the other hand, a federal court has jurisdiction, then, under the terms of §2283, it may enjoin state court proceedings where necessary in aid of its jurisdiction." Moore's *Federal Practice*, 2nd Ed. Vol. 1A, p. 2320.

The Court also considered whether the Taft-Hartley Act provided "express authorization for an injunction within the meaning of the first statutory exception of §2283 and concluded that it did not.

firmed by the Court. This distinction is highlighted by the following language from the Court's opinions. In *Capital Service* the Court held:

> "The state court injunction restrains conduct which the District Court was asked to enjoin in the §10(1) proceeding brought in the District Court by the Board's Regional Director against the union. * * * *If the state court decree were to stand, the Federal District Court would be limited in the action it might take. If the Federal District Court were to have unfettered power to decide for or against the union, and to write such decree as it deemed necessary in order to effectuate the policies of the Act, it must be freed of all restraints from the other tribunal.* To exercise its jurisdiction freely and fully it must first remove the state decree. When it did so, it acted 'where necessary in aid of its jurisdiction.'" 347 U.S. at 505-6. (Emphasis added)

In *Richman Brothers*, however, it was not the Board but a private litigant who sought to invoke the jurisdiction of the district court. Here the court stated:

> "Congress explicitly gave such jurisdiction to the district courts only on behalf of the Board on a petition by it or 'the officer or regional attorney to whom the matter may be referred'. §10(j), (1), 61 Stat. 149, 29 U.S.C. §160 (j) (1). To hold that the Taft-Hartley Act also authorizes a private litigant to secure interim relief would be to ignore the closely circumscribed jurisdiction given to the District Court and to generalize where Congress has chosen to specify.
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> * * *

"3. The exception to §2283 which permits the District Court to issue injunctions 'where necessary in aid of its jurisdiction' remains to be considered. In no lawyer-like sense can the present proceeding be thought to be in aid of the District Court's jurisdiction. *Under no circumstances has the District Court jurisdiction to enforce rights and duties which call for recognition by the Board. Such non-existent jurisdiction therefore cannot be aided.*

Insofar as protection is needed for the Board's exercise of its jurisdiction, Congress has, as we have seen, specifically provided for resort, but only by the Board, to the District Court's equity powers. Since the very presupposition of this proceeding is that jurisdiction of the subject matter of which the employer complained was in the Board and not in the state court, any aid that is needed to protect jurisdiction is the aid which the Board may need for the safeguarding of its authority. Such aid only the Board could seek, and only if, in a case pending before it, it has satisfied itself as to the adequacy of the complaint." 348 U.S. at 517, 519-20." (Emphasis added)

Under the scheme established by the Railway Labor Act, 45 U.S.C. §151 et seq., however, there is no agency comparable to the NLRB and it is the Federal district courts which are the primary arbiters of law in the exercise of their jurisdiction over actions arising under "* * * any Act of Congress regulating Commerce". 28 U.S.C. §1337. *International Ass'n of Machinists v. Central Airlines*, 372 U.S. 682 (1963).

Private litigants under the Railway Labor Act may freely invoke the jurisdiction of the Federal District Court, and the history of the FEC dispute is replete with the District Court for the Middle District of Florida's exercise of this jurisdiction. In the specific instance of the picketing here involved it was the petitioner who invoked the jurisdiction of the District Court by its allegations of the illegality of respondents picketing under controlling federal law. To petitioner's dismay, however, the District Court ruled that the BLE had the right, under Federal law, to engage in the self-help picketing of which petitioner complained. The District Court in its Order of April 26, 1967, (A. 64-68) which preceded this Court's *Jacksonville Terminal* opinion by two years, held that not only the Norris-LaGuardia Act, 29 U.S.C. §101 et seq., but also Section 20 of the Clayton Act, 29 U.S.C. §52, was applicable to the facts before the Court. (A. 67).[16] This statute provides that all such conduct, specified within its terms, shall not "* * * be considered or held to be violations of any law of the United States." See, *United States v. Hutcheson*, 312 U.S. 219 (1941). While this Court did

[16]Petitioner's oft-stated position (Pet. Br. 2, 12, 13, 19, 20, 35-40) that the April 26, 1967 order of the District Court was based solely upon the Court's finding of the applicability of the Norris-LaGuardia Act to Respondent's conduct, thus merely precluding an injunction is not borne out by the Record or the Order. In addition to the citation of Section 20 of the Clayton Act in the Court's 1967 Order, the District Judge characterized his holding in his June 19, 1969 Order as a *"delineation of rights of the parties"*. (A. 196). Petitioner does correctly point out (Pet. Br. pp. 12-38) that the 1967 Order also contains a citation to *Brotherhood of Locomotive Engineers v. Baltimore & Ohio R. Co.*, 372 U.S. 284 (1963) the leading decision of this Court prior to *Jacksonville Terminal* on labor's right of self-help when the procedures of the Railway Labor Act have been exhausted. This, of course, is the whole point of the case and of the District Court's Orders, i.e., the legality of respondent's self-help activity under Federal law, and the necessity of protecting that activity from state proscription, "in aid of its jurisdiction" and "to protect and effectuate its judgments".

not rely upon the Clayton Act in its *Jacksonville Terminal* opinion, the parties there argued the application of Section 20 at length, (See Brief for Petitioners, pp. 42-61; Brief for Respondent, pp. 41-44; Brief for Ass'n. of Amer. R.R., Amicus pp. 6-16; Brief for AFL-CIO, Amicus pp. 12-17) and the Court cited the *Hutcheson* case with approval,[17] 394 U.S. at 382.

With the appearance of this Court's *Jacksonville Terminal* decision in March, 1969, the legality of the picketing here involved and its protection from state proscription was manifest. See discussion, *infra*, pp. 53-56. Despite the *Jacksonville Terminal* decision and the District Court's prior finding of the applicability of the Clayton Act, petitioner and the Florida state court refuse to recognize the validity of Mr. Justice Brandeis' statement that, "One has no constitutional right to a 'remedy' against the lawful conduct of another." *Senn v. Tile Layers Protective Union*, 301 U.S. 468, 483 (1937).

In this situation, with the District Court having assumed subject-matter jurisdiction over this specific instance of self-help picketing, as well as the entire FEC dispute, having earlier held such picketing to be lawful conduct under controlling Federal law, as well as having entered numerous orders concerning the affected interchange and regulating the self-help allowable to the FEC and a mandatory injunction requiring good faith bargaining, *and*, with the benefit of this Court's *Jacksonville*

[17] Petitioner's dismissal of §20 of the Clayton Act as a "statutory antique" (Pet. Reply Brief to Brief in Opposition, p. 4) appears to suggest a new form of judicial repeal or perhaps a return to "statutory misconstruction." *Brotherhood of R.T. v. Jacksonville Terminal Co.*, 394 U.S. at 382.

Terminal decision holding such picketing to be lawful and "protected from state proscription". 394 U.S. at 393, the District Court acted to enjoin the state proceedings, "in aid of its jurisdiction", and "to protect or effectuate its judgments."

In *Richman Brothers* it was the subject-matter *jurisdiction* of the State *and Federal* Courts which was "preempted" by the exclusive jurisdiction of the NLRB, but in the present case it is the application of state law which is "preempted" by virtue of the protection by Federal law of Federal rights enforceable by the Federal courts. These Federal rights were the prior subject of adjudication in a Federal Court order entered pursuant to the Court's subject matter jurisdiction, and their enforcement would have enormous impact on the enforcement or frustration of other mandatory orders of the Court. This case is simply not comparable to *Richman Brothers*.

Additional distinctions between *Richman Brothers* and this case present themselves. In *Richman Brothers* the Court found no "recalcitrance on the part of state courts" 348 U.S. at 518-19, to apply the doctrine of *jurisdictional* preemption announced in *Garner v. Teamsters Local* 776, 346 U.S. 485 (1953). The course of *this* case, on the contrary, demonstrates manifest recalcitrance on the part of the Duval County Circuit Court to abide by this Court's *Jacksonville Terminal* decision. This Court has delimited with precision in that opinion the "extent of state power to regulate the economic combat of parties subject to the Railway Labor Act." 394 U.S. at 372. The line there drawn is not the "subtle line of demarcation", 348 U.S. at 518 of jurisdictional preemption with which the Court was concerned in *Richman Brothers*, but rather a

far less complex determination dictated by the institutional unsuitability of the Courts, rather than the Congress to make the ultimate determinations required. This fundamental basis of the *Jacksonville Terminal* decision was flouted by the state court. The *Richman Brothers* opinion also emphasized the desirability of limiting the number of courts which pass upon a case "before the rightful forum for its settlement is established." 348 U.S. at 519. Can there be any doubt that the rightful forum for this case is the District Court for the Middle District of Florida? Unlike *Richman Brothers*, there is no "penumbral region", 348 U.S. at 521 in connection with disputes subject to the Railway Labor Act which has been left unclarified by *Jacksonville Terminal*, in which the state courts may interpose their own notions of proper labor policy.

The reasons for the applicability to this case of the third statutory exception in Section 2283 "to protect or effectuate its judgments", are made absolutely clear by the recent decision by the Court of Appeals for the Fifth Circuit in a parallel Railway Labor Act controversy, *United Industrial Workers v. Board of Trustees of Galveston Wharves*, 400 F. 2d 320 (5th Cir. 1968), *cert. denied*, 395 U.S. 905 (1969).

In *Galveston Wharves* the Court of Appeals affirmed a Federal injunction against the enforcement of a state court injunction based upon Texas state law which prohibited peaceful picketing by a union incident to a lawful strike under the Railway Labor Act. The state court had enjoined all picketing at the Galveston Wharves, with the exception of the situs of a closed grain Elevator (which closing in violation of the "status-quo" provisions of the Railway Labor Act was the cause of the dispute). The Court of Appeals in two prior opinions (351 F. 2d

184; 368 F. 2d 412), had found the dispute to be "major" under the Railway Labor Act, and the District Court had entered an order requiring the parties to bargain. In affirming the District Court's injunction, the Court of Appeals stated:

> "* * * we conclude that the injunction issued by the district court was proper to carry out that court's bargaining order.
>
> Economic action after exhaustion of Section 6 procedures is an integral part of the collective bargaining scheme Congress prescribed when it enacted the Railway Labor Act. The effect of the state court injunction against a possible union strike is perhaps to render impotent the duty to bargain imposed by this Court. Texas and Texas courts may not agree with this view; but when the Railway Labor Act is otherwise applicable—as it is here—the Texas view is irrelevant. For the Railway Labor Act preempts all state legislation purporting to regulate the labor relations of covered employees." 400 F. 2d at 331.

The massive FEC dispute litigation pending in the District Court for the Middle District of Florida, and the mandatory injunctive orders issued by the Court seeking to compel good-faith bargaining on the part of FEC, supervising the self-help allowable to the FEC in accordance with the mandate of this Court in *Brhd of Ry. & S.S. Clerks v. Florida E.C. Ry. Co., supra*, and fashioning suitable relief for FEC's past and continuing violations of the Railway Labor Act, are all being thwarted and frustrated by the state court injunction prohibiting the exercise by the BLE of its lawful self-help, which the District

Court acted to remove. Moreover, these orders which the District Court's injunction was entered to protect, have been entered on behalf of the United States Government as well as the intervening unions, which as earlier mentioned is actively prosecuting its case against FEC. *United States v. Florida E.C. Ry. Co.*, Case No. 64-107-Civ-J (M.D. Fla.); Preliminary Injunction *aff'd*, 348 F. 2d 682 (5th Cir. 1965); *aff'd sub nom. Brhd. of Ry. & S.S. Clerks v. Florida E.C. Ry. Co. supra.* This protection by the District Court of orders entered on behalf of the Sovereign is significant in that Section 2283 is inapplicable to the United States. *Leiter Minerals v. United States*, 352 U.S. 220 (1957).

The fact that the District Court's earlier order of April 26, 1967 finding the picketing legal and denying an injunction was not a final adjudication of the pending federal case does not preclude the applicability of the third or "to protect or effectuate it judgments" exception to Section 2283. In *Sperry Rand Corporation v. Rothlein*, 288 F. 2d 245 (2nd Cir. 1961) Chief Judge Lumbard writing for the Court held in affirming an injunction to effectuate a discovery order in a pending federal case:

> "Nothing in the concluding phrase of §2283—which authorizes injunctions against state court proceedings when necessary 'to protect or effectuate' federal court judgments—limits its scope to final judgments. The policies which impelled Congress to enact 28 U.S.C. §2283 in order to overrule the decision in Toucey v. New York Life Ins. Co., 1941, 314 U.S. 118, 62 S. Ct. 139, 86 L. Ed. 100, apply to interlocutory as well as to final decrees." 288 F. 2d at 249.

See also *Looney v. Eastern Texas R. Co.*, 247 U.S. 214 (1918); *Ex Parte Simon*, 208 U.S. 144 (1908).

There are additional common sense reasons why the District Court's June 19, 1969 Order should be affirmed. If this Court were to hold disregarding all of the other cases pending regarding the FEC dispute and the interchange, that by reason of the preliminary status of the District Court's April 26, 1967 Order it is not entitled to be protected and effectuated, a substantially meaningless race for the entry of a Final Judgment would ensue.

The obvious reason that respondents have not sought the entry of a "Final" Order by the state court is that once such an order is entered the petitioner would immediately assert its alleged *resjudicata* effect in the federal action, claiming that the state court had "adjudicated" respondents "federal preemption defenses". If the federal Court on the other hand were to enter its "Final Order" first, it would then unquestionably be entitled to stay the "relitigation" of the matter in the state court, even under petitioner's reading of Section 2283. This essentially meaningless exaltation of form over substance ought not be controlling in the extraordinary circumstances of this case. Compare, *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379 (1953); *Local No. 438 v Curry*, 371 U.S. 542 (1963). Should the state court win the race, an additional three year delay similar to that in *Jacksonville Terminal* while respondents exhaust the Florida State appellate procedures, would bring the FEC dispute to its eleventh year, and even this seemingly interminable labor dispute is not likely to survive into a second decade.

B. *The picketing involved in the present case is protected by the rationale of this Court's decision in Brh'd. of R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969)

Petitioner devotes a major portion of its Brief (Pet. Br. pp. 32-42) to a defense of what it terms the "intelligible distinction", Pet. Br. p. 21, drawn by the Duval County Circuit Judge to confine the *Jacksonville Terminal* decision of this Court to its precise facts. We respectfully submit that the "Letter Opinion" of the Circuit Judge (A. 181-182) and the purported distinctions drawn in its support are indefensible, except by the type of logic which would recognize as a valid distinction the fact that the state court judge in the present case is several doors down the hall in the Duval County Court House from the Judge who entered the *Jacksonville Terminal* injunction.

As we read *Jacksonville Terminal* the holding of the Court is to be found in the concluding portion of the opinion designated Roman Numeral VIII, 394 U.S. at 390-3. The holding, we submit, is primarily based upon the premise that it is for the Congress to legislate the limits of the economic self-help allowable to parties who have exhausted the procedures of the Railway Labor Act, and that "[a]ny other solution—apart from the rejected one of holding that *no* conduct is protected—would involve the courts once again in a venture for which they are institutionally unsuited." 394 U.S., at 393.

Notwithstanding the above, the state court as indicated by its "Letter Opinion" determined that *it* was institutionally suited to make such determinations, and to make its conclusions from the facts directly opposite from those of the Federal District Court which had previously ruled on the same facts, prior to the *Jacksonville Terminal* decision of this Court.

The Federal District Court had found in its 1967 Order that, "The use of ACL's Moncrief Yard by FEC to receive and deliver freight is an integral and necessary part of FEC's operations." (A. 66). As restated in its 1969 Order the Federal District Court said, "In its Order of April 26, 1967, this Court found that Plaintiff's Moncrief Yard, the area in question,' is an integral and necessary part of [Florida East Coast Railway Company's] operations'," (A. 195).

The facts of FEC's daily interchange operations within the Moncrief Yard can hardly be denied by the Petitioner. As a percentage of the total amount of FEC interchange traffic handled, the Moncrief Yard accounted in 1967 for 60%, as opposed to 40% within the Terminal Company. (A. 61). With the merger of the ACL and SAL this percentage is likely to be significantly greater today, and could be made total by the SCL and FEC. The "common situs" aspect of the FEC's Moncrief Yard operations is readily apparent.

Moreover the picketing at Moncrief Yard as opposed to that carried on at the Terminal Company was not picketing in the usual sense of requesting employees not to cross and not to perform any work, but was confined to an appeal to ACL employees, "to induce those employees to refuse to perform work for their employer which was connected with the struck employer's normal business operations." *Brhd. of R. Trainmen v. Jacksonville Terminal Co., supra 394 U.S. 389*, See, *Local 761 IUE v. NLRB*, 366 U.S. 667 (1961). And as the Court further stated in *Jacksonville Terminal:*

> "The Court affirmed this principle in United Steelworkers of America, A.F.L.-C.I.O. v. NLRB, *supra*, where it held that striking employees could picket to induce a neutral railroad's employees to refuse to pick up and deliver cars for the struck employer—even though the picketed gate was owned by the railroad, and the railroad's employees would have to pass by the place of picketing to pick up and deliver cars for other plants that were not struck." 394 U.S. at 389.

Thus Petitioner's argument that "The only relationship the [Moncrief] Yard has with the FEC is interchange through 'pick-up and delivery,'" (Pet. Br. p. 21) appears simply specious, for what else does one railroad do with another but pick up and deliver cars, and what is more essential to a railroad's normal business operations than "pick-up and delivery." And where the actual situs of this regular daily pick-up and delivery, by design of the carriers, is within the premises of a non-struck carrier, cannot the striking employees under the Railway Labor Act, as under Taft-Hartley, "picket to induce a neutral railroad's employees to refuse to pick up and deliver cars for the struck employer—even though the picketed gate was owned by the railroad, and the railroad's employees would have to pass by the place of the picketing to pick up and deliver cars for other plants that were not struck." 394 U.S. at 389. See, *United Steelworkers v. NLRB*, 376 U.S. 492 (1964).

We submit that if anything, the picketing at the Moncrief Yard "common situs" in the present case is substantially more "primary" in character than the picketing which was before the Court in *Jacksonville Terminal* and

was held to be "conduct protected against state proscription." 394 U.S. at 393. If despite *Jacksonville Terminal* the decision as to whether picketing by parties who have exhausted the Railway Labor Act procedures is "primary" or "secondary" is a determination to be made by the courts, and if, despite *Jacksonville Terminal*, this distinction is to be determinative of the area "protected against state proscription," 394 U.S. at 393, we submit the Federal Court's determination that this picketing was lawful and protected, and its injunction against the enforcement of the proscribing state court injunction were clearly proper as "necessary in aid of its jurisdiction" and "to protect or effectuate its judgments", 28 U.S.C. §2283. See discussion, *supra*, at pages 27-52.

C. *Brhd. of R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969) ought not be summarily overruled in this case.*

In the portion of Petitioner's Brief, (Pet. Br. pp. 52-59) devoted to the proposition that this Court should overrule *Brhd. of R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969), there is a considerable rehash of the arguments made by the carrier there, both in its Brief on the merits and its Petition for Rehearing which was denied in May 1969. The argument for the union party there involved was fully made to the Court in its Brief upon the merits and we do not deem it essential to burden the Court with a repetition of that argument here. The statutory "gap" which petitioner complains of and seeks to reargue here (although at times referred to as a "void", Pet. Br. p. 54) has been fully briefed by the union party for the Court not only in *Jacksonville Terminal*, but also in the earlier case in this Court to which petitioner was a named party, *Atlantic Coast Line R. Co. et al. v. Brhd. of R.*

Trainmen, 385 U.S. 20 (1966), *affing*, 362 F. 2d 649 (5th Cir. 1966). We would ask to have the Court consider those union Briefs and the argument therein contained as incorporated herein by reference.

We, of course, recognize that the Court has been sharply divided on the matter of the Terminal Company picketing. If the carriers are distressed by the result reached by the Court in *Jacksonville Terminal* both the opinion for the Court and the dissenting opinion indicate that it is a matter for the Congress to consider.

We respectfully submit that it would be grossly inappropriate for the Court to render stillborn its *Jacksonville Terminal* decision by overruling it in this case. As we have pointed out above, the picketing in the present case did not request so-called "neutral" employees to cease to perform work for their employer but was confined simply to an appeal not to perform work by, "employees of neutral delivery men furnishing day-to-day service essential to the [FEC's] regular operations." *United Steelworkers v. NLRB*, 376 U.S. 492, 499 (1964). There is a substantial basis for finding the picketing in the present case more "primary" than the picketing involved in *Jacksonville Terminal*, even if such a determination were relevant under the doctrine established in *Jacksonville Terminal*.

Moreover, impelling consideration of judicial administration and the place of this Court in our system of justice weigh against a quick reversal of the doctrine enunciated in *Jacksonville Terminal*, particularly in light of the Florida State Court's action in this case. The attitude expressed by the state court judge, see page 35, *infra*, and exemplified by his "Letter Opinion" (A. 181-2) "distinguishing" the *Jacksonville Terminal* decision would be, in effect, rewarded by the immediate reversal of the decision

by this Court. In the future any narrowly divided decision of the Court might well be subject to such "distinction" in the hope expressed or implied that time would effect a reversal of the attitude of the Court. In any labor controversy, particularly, the lapse of time is ordinarily the critical factor in resolving the dispute. Compare, *Local No. 438 Construction & General Laborers' Union v. Curry*, 371 U.S. 542 (1963). Such a precedent of virtually immediate reversal of a decision of this Court would have undesirable effects upon the administration of justice, we submit, far transcending the importance of the present case.

There has been no "escalation" (Pet. Br. p. 50)' by the labor organization parties to the FEC dispute, beyond the areas where FEC trains, operated by striker replacement crews, actually and daily operate in the face of lawful strikes. It is appropriately for the Congress and not the courts to legislate "the balance to be struck between the uncontrolled power of management and labor to further their respective interests'. * * * The Congress has not yet done so." 394 U.S. at 392.

D. *The Norris-LaGuardia Act, 29 U.S.C. §101 et seq., did not prohibit the District Court's injunction under the circumstances of this case.*

This injunction entered by the Federal District Court below to stay proceedings in the state court, "where necessary in aid of its jurisdiction or to protect or effectuate its judgments", 28 U.S.C. §2283, was not prohibited by the Norris-LaGuardia Act, 29 U.S.C. §101 et seq, under the facts of this case. Petitioner's argument in this regard simply and completely ignores both the specific language of the Act, and the manifest intent and spirit of the framers of this legislation. The right to unfettered enforcement

of a state court injunction which invades the subject-matter jurisdiction properly assumed by a Federal District Court, and nullifies the enforcement of previous District Court orders is nowhere to be found as conduct protected by the Norris-LaGuardia Act.

In holding Norris-LaGuardia inapplicable to the Federal injunction at bar, the Court need not go so far as did the Court of Appeals for the Seventh Circuit in *Brotherhood of Locomotive Engineers v. Baltimore & O.R. Co.*, 310 F. 2d 513, 517-18 (7th Cir. 1962) which held, based upon a "thorough examination of the Act and its pertinent legislative history", 310 F. 2d at 517, that Norris-LaGuardia was inapplicable as applied to " * * * employers of labor" within Section 2, 29 U.S.C. §102, except where the statute specifically so provides.[18] We do submit, however, that this holding was a proper construction of the statute.

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[18]The only provisions of the Act which specifically include employer conduct are Sections 3(a) and (b), 29 U.S.C., §103(a) (b), and Section 4(b), 29 U.S.C. §104(b). These provisions proscribe the enforcement of "yellow dog" contracts. In an obvious attempt to protect the statute from constitutional attacks in a judicial atmosphere of undue emphasis upon substantive due process protecting the rights of property, the Congress included a prohibition against the enforceability of promises "not to join, become, or remain a member", 29 U.S.C. §103(a), or to "withdraw from an employment relation in the event he joins, becomes or remains a member", 29 U.S.C. §103(b), of any "employer organization" as well as "labor organization." It hardly need be said that the abuses which Congress was aiming at eliminating here were not really those caused by membership in "employer organizations". As the Court of Appeals for the Seventh Circuit stated of these provisions: "Two isolated exceptions to this overall purpose appear in the Act and serve to emphasize that they are exceptional provisions." *Brhd. of Locomotive Engineers v. Baltimore & O. R. Co.*, 310 F.2d at 518.

A full examination of the text and history of the Norris-LaGuardia Act supports the reading given it by the Court of Appeals for the Seventh Circuit.

The course which this Court followed in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457-59 (1957) provides more than ample justification for finding the injunction at bar to be without the ambit of Norris-LaGuardia. In Lincoln Mills the Court held that:

> "Section 7 of that Act prescribes stiff procedural requirements for issuing an injunction in a labor dispute. The kinds of acts which had given rise to abuse of the power to enjoin are listed in §4. The failure to arbitrate was not a part and parcel of the abuses against which the Act was aimed. * * * Though a literal reading might bring the dispute within the terms of the Act * * * we see no justification in policy for restricting §301(a) to damage suits, leaving specific performance of a contract to arbitrate to the inapposite procedural requirements of that Act. * * * The congressional policy in favor of the enforcement of agreements to arbitrate grievance disputes being clear, there is no reason to submit them to the requirements of §7 of the Norris-LaGuardia Act. 353 U.S. at 457-8.[19]

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[19]In holding §7 procedural requirements to be "inapposite" to specific performance of a contract of arbitration, the Court cited with approval Judge Magruder's opinion in *Local 205, United Electrical Workers v. General Electric Co.*, 233 F.2d 85 (1st Cir. 1956); *aff'd on other grounds*, 353 U.S. 547 (1957), at page 92, where he said:

> "We do not believe that Congress intended §7 in any case to be a snare and a delusion, holding out the possibility of jurisdiction but demanding for its exercise sworn allegations of inapposite facts."

We submit that congressional intention to permit the Federal District Courts to protect their subject-matter jurisdiction and orders from infringing state court action is equally clear as expressed in 28 U.S.C. §2283, and was properly exercised here for that purpose, and in order to effectuate respondent's self-help rights under the Railway Labor Act.

Petitioner argues that the procedural requirements of Section 7 were not met by the District Court below in his June 19, 1969 Order. Obviously it was "inapposite" for the District Court to find in this case that, "the public officers charged with the duty to protect [BLE's] property are unable or unwilling to furnish adequate protection", as required by Section 7(c) of Norris-LaGuardia, in order to act to protect its jurisdiction and orders. Similarly the other procedural requirments of Section 7 are simply *non-sequiturs* in the circumstances here involved.

Morover it is equally obvious here as in *Lincoln Mills* that a Federal injunction against the enforcement of a state court injunction which infringes the jurisdiction and nullifies the orders of a Federal Court was not "a part and parcel of the abuses against which the [Norris-LaGuardia] Act was aimed." 353 U.S. at 458. The legislative history of Norris-LaGuardia contains no reference to congressional concern with such a case. Petitioner has claimed for the first time in the Petition, however, that the District Court's injunction violates the literal provisions of Section 4(d) of Norris-LaGuardia, 29 U.S.C. §104(d).[20] If a spirit

[20] 29 U.S.C. §104(d)

"By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;"

of "mutilating narrowness," *United States v. Hutcheson*, 312 U.S. 219, 235 (1941) and total literalism is to be applied in construing this provision of Norris-LaGuardia, we have pointed out that petitioner is not "* * * *aiding* any person participating or interested in any labor dispute", but is rather itself seeking the enforcement of the state court injunction. In the Congressional debates the injunctive abuses which this provision was drafted to meet were explained by Congressman Garber: "Has not the employee the right to accept the aid of his friends in a suit at law?" 75 Cong. Rec. 5492 (1932).

To read the Norris-LaGuardia Act in the manner contended for by the petitioner is not required by even the most extreme application of literalism, and would be, we submit, both ahistorical and contrary to the emphasis, repeatedly expressed by this Court, on construing the Norris-LaGuardia Act in a manner that will protect the Act's expressly stated (Section 2, 29 U.S.C. §102) congressional policy. *United States v. Hutcheson*, 312 U.S. 219 (1941); *Order of Railroad Telegraphers v. Chicago & N.W. R. Co.*, 362 U.S. 330, 335-6 (1960).

An additional factor weighs against the applicability of Norris-LaGuardia in the circumstances of this case. The District Court's injunction, as pointed out by Petitioner was "*in form*" (Pet. Br. p. 24 fn. 1) one enjoining the ACL from enforcing the state court injunction. Such a Federal injunction is, in fact, intended to run against the state court whose injunctive order had infringed the plenary jurisdiction of the Federal Court assumed in the numerous cases arising out of the FEC dispute, and which nullified and interfered with enforcement of the Federal Court's orders. The state court clearly cannot be considered a

"person participating or interested in a labor dispute" 29 U.S.C. §113(b) under any view of the Norris-LaGuardia Act. Consequently, an injunction such as in the case at bar, which, except for matters of form, is intended to restrain the state court from proceeding, does not violate any prohibition of Norris-LaGuardia. The District Court upon its finding that a stay of the state proceeding was required in aid of its subject matter jurisdiction and to protect and effectuate its earlier orders was clearly entitled to accomplish this purpose, which is in no way related to the language or purposes of the Norris-LaGuardia Act, by the issuance of the June 19, 1969 Order.

Finally, the District Court's injunction acted to enforce respondent's self-help rights arising under the Railway Labor Act, for the protection of which this Court has frequently held the Norris-LaGuardia Act to be inapplicable. *E.g. Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515 (1937); *Brhd. of R. Trainmen v. Howard*, 343 U.S. 768 (1952); *Brhd. of R. Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. 30 (1957).

CONCLUSION

For the reasons stated the Order dated June 19, 1969 of the District Court of the Middle District of Florida, Jacksonville Division, should be affirmed.

Respectfully submitted,

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